Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Oneida of the Thames Emergency Medical Services,

applicant,

and

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada),

respondent.

Board File: 28468-C
Neutral Citation: 2011 CIRB **564**
January 14, 2011

The Canada Industrial Relations Board (the Board) was composed of Ms. Elizabeth MacPherson, Chairperson, Mrs. Judith MacPherson Q.C. and Mr. William McMurray, Vice-Chairpersons.

Counsel of Record

Mr. B.R. Baldwin, for the Oneida of the Thames Emergency Medical Services;
Mr. Anthony F. Dale, for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada).

These reasons for decision were written by Ms. Elizabeth MacPherson, Chairperson.

I–Nature of the Application

[1] This is an application brought by the Oneida of the Thames Emergency Medical Services (Oneida EMS or the employer) pursuant to section 18 of *Canada Labour Code*

(*Part I–Industrial Relations*) (the *Code*). The Oneida EMS requests that Board Order no. 9918-U, dated August 10, 2010, be rescinded on the grounds that the employer's activities properly fall within provincial jurisdiction for the purposes of labour relations and thus that the Board had no jurisdiction to certify the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (the CAW or the union) as bargaining agent for the employees of the Oneida EMS.

[2] For the reasons that follow, the application is granted and Board Order no. 9918-U is hereby rescinded pursuant to section 18 of the *Code*.

II–Background

[3] On July 2, 2010, the CAW filed an application for certification pursuant to section 24 of the *Code*, seeking representation rights for a bargaining unit of 16 employees of the Oneida EMS located on the Oneida First Nation reservation in Ontario. This application was not contested by the employer nor was a hearing requested. In accordance with its standard practice and section 3(*b*) of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*), this uncontested application for certification was dealt with by a Board Registrar and certification order no. 9918-U was issued on August 10, 2010.

[4] The employer's application to rescind Order no. 9918-U was filed on November 22, 2010. The application acknowledges that it was being made beyond the 21-day time limit set out in section 45(2) of the *Regulations* and asks the Board to exercise its discretion to extend the time limit for the filing of the application.

III–Positions of the Parties

A–Oneida EMS

[5] The employer submits that the Board has the necessary authority, set out in section 46 of the *Regulations*, to relieve against the time limits contained in the *Regulations* where the exemption is necessary to ensure the proper administration of the *Code*. It asks the Board to exercise its discretion

to extend the time limit for the filing of the reconsideration application in this case because the application raises important issues that warrant review; specifically an issue of constitutional law.

[6] The employer explains that Oneida EMS is a land ambulance service, based on the Oneida Nation of the Thames settlement near London, Ontario. It is a distinct operation, reporting to the Oneida Nation, that was established in January 2005 pursuant to an agreement between the Oneida Nation and the Ontario government. It provides emergency medical services to the Oneida Nation of the Thames, Chippewa of the Thames First Nation, Munsee Delaware First Nation and non-First Nations citizens of Elgin and Middlesex County. The employer disclosed that, in 2010, more than half of the Oneida EMS calls related to non-First Nations patients. The employer argues that it provides its ambulance services and patient care in the exact same manner as any other ambulance service, and there is no aspect of its operation that seeks to be culturally unique or that is modified to suit the specific cultures of the First Nations.

[7] The employer submits that its operations are regulated by the Ontario *Ambulance Act*, R.S.O. 1990, c. A.19 and the *Regulations* thereunder. It is entirely funded by the Ontario Ministry of Health and its hours of operation are set by the Ministry of Health.

[8] The employer submits that its operations fall under provincial jurisdiction for the purpose of labour relations, as its essential character is to provide EMS services, a matter within provincial jurisdiction. It argues that its essential character as an EMS service is not altered merely because its services are delivered, in part, to First Nations patients.

[9] The employer draws an analogy between its operations and the child and family services at issue in two decisions issued by the Supreme Court of Canada on November 4, 2010, *NIL/TU,O Child and Family Services Society* v. *B.C. Government and Service Employees' Union*, 2010 SCC 45 (NIL/TU,O) and *Communications, Energy and Paperworkers Union of Canada* v. *Native Child and Family Services of Toronto*, 2010 SCC 46 (Native Child and Family Services of Toronto). These cases considered whether an institution providing child welfare services specifically to a First Nations community fell under provincial or federal jurisdiction for labour relations purposes. In both cases, the Supreme Court found that the essential nature of the organization was

to provide child welfare services and that they were in provincial jurisdiction, despite the fact that their operations were specifically directed at serving a First Nations community. The Court held that neither the cultural identity of the organization's clients and employees, nor its mandate to provide culturally-appropriate services to Aboriginal clients, displace the presumption that labour relations are provincially regulated.

[10] The Oneida EMS submits that its ordinary and habitual activity is the running of a land ambulance service and that this activity does not touch on issues of First Nations status or rights. Accordingly, it argues, its operations fall under provincial jurisdiction for all purposes, including labour relations.

B–CAW

[11] The CAW argued that the Board should not entertain the application for reconsideration because it was filed beyond the time limit prescribed in section 45 of the *Regulations* and the employer had not provided any explanation for the delay.

[12] The union argues that all of the facts regarding the Oneida EMS' operations now adduced by the employer were known at the time of the certification application and could have been raised in those proceedings. It suggests that the employer is endeavouring to take advantage of a change in the law that occurred on November 4, 2010 when the Supreme Court of Canada issued its decisions in NIL/TU,O and Native Child and Family Services of Toronto.

[13] The union submits that this change in the law is an insufficient ground to justify an application for reconsideration, particularly when the employer did not contest the constitutional jurisdiction of the Board in the original certification proceeding.

[14] The union argues that it has suffered prejudice as a result of the employer's delay. It has delivered a notice to bargain to the employer pursuant to the *Code* and has missed an opportunity to file a concurrent application for certification with the Ontario Labour Relations Board. It alleges that delays in the collective bargaining process for newly certified bargaining units tend to result in

diminished employee support for the bargaining agent. The union states that it cannot now have confidence of success in an application to the OLRB, where a representation vote is mandatory. The union suggests that the Oneida EMS will suffer no prejudice if the Board declines to reconsider Order no. 9918-U.

[15] The union takes no position on the substance of the employer's application.

IV–Analysis and Decision

A–Timeliness

[16] Section 45(2) of the *Regulations* requires applications for reconsideration pursuant to section 18 of the *Code* to be filed within 21 days of the date on which the impugned order is issued. Section 46 of the *Regulations* provides the Board with the power to vary or exempt a person from complying with any rule of procedure under the *Regulations*, including a time limit, "where the variation or exemption is necessary to ensure the proper administration of the *Code*."

[17] The Board expects parties to put forward their entire case at the time that an initial application or complaint is made (see *Canadian National Railway Company*, 2009 CIRB 446, upheld by the Federal Court of Appeal in *Teamsters Canada Rail Conference* v. *Canadian National Railway Company*, 2009 FCA 368). Furthermore, Board decisions are intended to be final (section 22 of the *Code*) and reconsideration under section 18 is the exception (*Ted Kies*, 2008 CIRB 413). Ordinarily, the Board would not entertain an application for reconsideration based on facts that a party neglected to plead at the time of the original application (*Robert Adams*, 2001 CIRB 121).

[18] However, in this case, the grounds for the reconsideration application are that the Board did not have the necessary constitutional jurisdiction to issue the impugned order. If this position is correct, then the Board's order is void *ab initio* and can have no force or effect.

[19] The Board accepts the employer's submission that it delayed filing its reconsideration application while the Supreme Court of Canada's decisions in NIL/TU,O, and Native Child and

Family Services of Toronto, were pending. While it might have been preferable for the employer to file its reconsideration application within the time period specified in the *Regulations* and ask that it be held in abeyance pending the Supreme Court decisions, given the conflicting judicial opinions on the subject of jurisdiction over organizations providing services to First Nations citizens, it was not unreasonable for the employer to delay until the Supreme Court provided the clarity that it ultimately has provided. The Board notes that the employer was diligent in bringing the application within a short period following the release of the Supreme Court of Canada decisions on November 4, 2010.

[20] The applicant has made out a *prima facie* case in support of its application and it is incumbent on the Board to consider the application. Neither a Board regulation nor policy can clothe the Board with a constitutional jurisdiction that it does not have, or protect an order issued without jurisdiction from review. This is clearly a case where an exemption from the time limit set out in the *Regulations* is necessary to ensure the proper administration of the *Code*.

[21] Accordingly, in the particular circumstances of this case, the Board grants the requested extension of the time limit for the filing of the employer's section 18 application and will consider the application on its merits.

B–Merits of the Application

[22] The Oneida EMS submits that its ordinary and habitual activity is the running of a land ambulance service and that this activity does not touch on issues of First Nations status or rights. The evidence submitted by the employer, which includes the Performance Agreement between the Oneida Nation of the Thames and the Ontario Ministry of Health and Long Term Care, the Land Ambulance Certificate issued to the Oneida EMS, various correspondence between the Oneida EMS and the Ontario Ministry of Health and Long Term Care and the records of call volumes substantiate the employer's claim that it is operating an ambulance service that is not restricted to serving Aboriginal patients and does not implicate or infringe upon the core federal responsibility for Indians and Lands reserved for Indians.

[23] The Board does not consider the reference to the *Code* and the *Canada Labour Standards Regulations*, C.R.C., c. 986 in Appendix A of the Performance Agreement to be an admission or acknowledgment by the provincial Ministry of Health and the Oneida Nation of the Thames that the Oneida EMS operations are federally regulated, as that provision goes on to also cite the provincial *Ambulance Act* and regulations. In any event, this provision is not determinative of constitutional jurisdiction but merely reflects the parties' understanding.

[24] The union does not dispute the facts as presented by the employer.

[25] Regardless of whether one adopts the analytical framework established by the majority or the minority of the Supreme Court of Canada in NIL/TU,O and Native Child and Family Services of Toronto, it is clear that, on the facts regarding the Oneida EMS operations as now presented to the Board, the nature, operations and habitual activities of this entity are subject to provincial jurisdiction over labour relations. The activities of the Oneida EMS do not fall within the protected "core of Indianness" under section 91(24) of the *Constitution Act, 1867*.

[26] Accordingly, the Board had no jurisdiction to issue Order no. 9918-U certifying the CAW as bargaining agent for the employees of the Oneida EMS and that order is hereby rescinded.

[27] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

Judith F. MacPherson, Q.C.
Vice-Chairperson

William G. McMurray
Vice-Chairperson